

Achievement of Market-Friendly Initiatives and Results Program
(AMIR 2.0 Program)

Funded by
U.S. Agency for International Development

Customs Bonds: Legal Legislation

Final Report

Deliverable for PSPI, Workplan Activity No. 555.01
Legal Issue Review, Bonds and Voluntary Compliance
Contract No. 278-C-00-02-00210-00

January 2004

This report was prepared by IBLAW, subcontractor to the U.S. Agency for International Development for the AMIR Program in Jordan.

Data Page

Name of Component:	PSPI
Author:	IBLAW
Practice Area:	Trade and Investment
Service Offering:	N/A
List of Key Words Contained in Report:	World Trade Organization, Customs bond, Jordanian legislation, Security, Kyoto Convention, Insurance legislation, Bank guarantee, Civil Code

Abstract

This report examines the legal issues relating to the limitation on the types of financial securities that are permitted under current practice for goods crossing the borders of Jordan. One type of security that is not available for wide use in Jordan is the posting of a security bond, generally referred to as a Customs bond. By international experience, Customs bonds, offered as a product by private sector insurance companies, are a much more cost effective form of security than cash deposits or bank guarantees. The first part of the report examines the definition and nature of Customs bonds. The second part analyzes the legal status of Customs bonds under Jordanian legislation, and in particular under the Customs and insurance legislation. The third part presents conclusions and recommendations, which uncover that customs bonds may be allowed as an accepted form of guarantee by the insured to cover his liabilities incurred under the Customs Law, other than fines. However, if bonds are permitted, permission should be granted in writing, the necessary instructions and administrative decisions should be issued, and certain articles in the Customs law require amendments.

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Executive Summary

This report is a continuation on the efforts lead by the USAID-funded AMIR Program to modernize customs operations in Jordan and transform customs into an advanced organization based on international best practice. IBLAW worked extensively with the AMIR Program on customs modernization when producing amendments to the Customs Law to bring it into compliance with the World Trade Organization agreements and concepts. IBLAW has been again requested to conduct specific studies on matters pertaining to modernization of customs operations and functions, as part of an overall initiative to introduce progressive and effective governance to Jordan's Customs Department.

The report forms an integral part on that ongoing work, and examines a legal issued identified in customs operations relating to the limitation on the types of financial securities that are permitted under current practice for goods crossing the borders of Jordan. In modern Customs practice as defined in the amended Kyoto Convention, securities are to be kept as low as possible, if required. One type of security that is not available for wide use in Jordan is the posting of a security bond, generally referred to as a Customs bond. By international experience, Customs bonds, offered as a product by private sector insurance companies, are a much more cost effective form of security than cash deposits or bank guarantees.

This report is organized in three parts to discuss the legal issue of customs bonds in Jordan. The first part examines the definition and nature of Customs bonds. The second part analyzes the legal status of Customs bonds under Jordanian legislation, and in particular under the Customs and insurance legislation. Analysis of the insurance legislation in this part also leads to discussing the legality of the concept of customs bonds under the Civil Code, and the availability of insurance bonds under the insurance legislation as a class of insurance. The third part presents conclusions and recommendations.

Adopting customs bonds may be allowed as an accepted form of guarantee by the insured to cover his liabilities incurred under the Customs Law, other than fines. However, and in case this is granted, the following must take place:

- Seek to obtain the explicit and preferably in writing, the direction of the Insurance Commission on the availability of customs bonds under the current stipulation of the insurance legislative package, or in the case where this was not applicable, seek to amend the Instructions on Classes and Licenses of Insurance Business No. (1) of 2000 to provide for this type of insurance explicitly.
- Issue the necessary instructions/administrative decisions pursuant to the Customs Law No. 20 of 1998, which provide for using such type of guarantees, in addition to, or in replacement of, the guarantees securing customs operations mentioned in the Law.
- Amend the articles in the Customs Law that do not allow the application of alternative/additional forms of securities such as customs insurance.

I. Customs Bonds: Definition and Nature

A customs bond is an insurance product utilized by a person undertaking transactions with Customs authorities (usually the clearing agent), and whereby this person engages the insurance company to insure his commitments to pay the customs dues incurred thereupon. Such dues include the customs duties that are applied or that should be applied on the importation of goods and any fines imposed on the importer for any violation of the customs provisions that that person commits. The beneficiary of such a customs contract is the customs authority concerned.

II. Legal Status of Customs Bonds under Jordanian Legislation

In order to examine the legal acceptability of customs bonds, we have raised the following questions:

- ? To what extent are these bonds accepted as security instruments under current customs legislation, namely the current Customs Law?
- ? To what extent are such bonds an acceptable insurance product under the applicable laws regulating and governing insurance products and transactions, namely the Insurance Law and insurance-related provisions of the Civil Code?

In addition, and in light of our background research, we have found it imperative to address the authoritative jurisprudential literature on the nature and required features for validity of insurance contracts, as this may weigh on the decisions of policymakers in validating such instruments.

A. Customs Bonds and Customs Legislation

The Customs Law No. 20 of 1998 provides explicitly for the use of certain securities and as follows:

*Article 31: D-Upon the Director's approval, customs clearance formalities may be completed without submission of the certified invoices and required documents, **against a cash deposit or a bank guarantee** that may not exceed respectively 2% and 4% of the value of the goods, in lieu of each document. The payer shall be refunded if the certified invoices and required documents are submitted within (60) days of payment.*

Article 41: The importation of goods that constitute infringement on any intellectual property right subject to protection under the relevant Legislation in force, on the following basis:

*A-1 The right holder may **submit to the competent court a petition with a cash or bank guarantee** accepted by the court, to suspend release and clearance procedures for the said goods, provided the petition is supported by sufficient evidence about infringement, and a detailed description of the infringing goods.*

Article 80: A- A special committee of three senior officials shall be formed by the Minister and shall look into disputes regarding the value, origin, and specification of goods and the applicable tariffs thereupon.

E- The goods may be delivered before settlement of the disagreements mentioned in paragraph (A) of this Article **according to the terms, procedures, and guarantees specified by the Director.** However, samples of the goods in question shall be kept with the Department.

F- Customs duties and other fees and taxes that are not disputed shall be levied as revenue, **while a deposit or a bank guarantee shall be placed** against disputed duties and other fees and taxes until settlement of the dispute.

Article 82: C-The withdrawal of goods before payment of duties and taxes in cases of emergency, the terms of withdrawal, **the required guarantees**, the assessment of taxes and duties thereupon, and the receipts against which duties and taxes are collected and other related matters **shall be provided** for in instruction issued by the Minister.

Article 83: Goods may be withdrawn by those liable for payment, before payment of duties and taxes, **but against a bank or a cash guarantee** and at the terms and rules specified by the Director.

Article 88: Payment of Duties and other fees and taxes on goods that enter the Kingdom, moved within, or pass in transit therein may be suspended **against a cash or a bank guarantee or a guaranteed undertaking¹**, in accordance with the Director's instructions.

Article 102: Companies and agencies licensed by the Director may, **upon submitting the required guarantees**, carry out transportation under a transit status on the basis of international documents-namely unified international booklets and other documents. Such transportation shall be by means of vehicles which meet the terms and specifications accepted by the Director.

Article 108: Working conditions at public warehouses, warehouse storage fees and other expense thereof, allowances to be paid to the Department, **and required guarantees** and any other provisions and specifications pertinent to public warehouses shall be regulated by instructions issued by the Director and published in the Official Gazette.

Article 117: Licenses to set up a private warehouse shall be issued by the Minister's decision upon the Director's recommendation, which decisions shall specify the warehouse site, annual payments, and **the guarantees to be submitted** before the start of activities, and other related provisions.

Article 133: A- Duties and other fees and taxes on foreign goods may be suspended if the goods are brought into the Kingdom for manufacturing, completion of manufacturing, or repair, for subsequent export within a period of not more than three years. This shall apply regardless of whether the beneficiary therefrom is the exporter or the manufacturer.

¹ Note that guaranteed undertaking is not defined in Customs Law.

*D- Goods which shall be eligible to this status, and the required **terms and guarantees for eligibility** to the provisions of this Article shall be specified in instructions issued by the Director.*

*Article 167: B- A license applicant [customs clearance agent] **shall submit a bank surety** in the amount set by the Director, but which shall not be less than 5,000 JD, **as a guarantee against liabilities that may result from the actions of the licensee or of the employees thereof**. The Director may set the surety at a higher amount.*

*Article 193: The Director may ask the competent authorities to stop offenders and smugglers from leaving the country if the materials seized are not sufficient to cover the customs duties, taxes and fines. The Director may cancel the request if the offender or smuggler **submits a bank guarantee** to cover the amounts that may be due over and above the value of the seized property.*

*Article 231: B- Notwithstanding the provisions of any other law, the Customs Courts shall not hear cases against the Treasury unless the plaintiff **provides a cash or a bank guarantee** equivalent to 25% of the required amount- taxes, fees and fines included- or to the amount acknowledged by the claimant, whichever is higher.*

As can be inferred from the Articles cited above, the law specifies the securities required/permitted in specific cases. In all such cases, the law does not leave much room for the customs authorities to accept any other forms of security, other than those specifically stipulated (see Article (31/d) and Article (80/f) for example).

It is only in a few cases that the law allows the competent authorities at the Customs Department to determine the type and form of security it accepts, either pursuant to an administrative decision or instructions, issued for this purpose (for example, see Article (82/c) and Article (102)). However, and in closer perspective, some of the specific cases allowing for alternative or additional guarantees (namely, Article (82/c) and Article (133/d)) may be interpreted as being wide enough in scope to cover customs operations and transactions relating to the clearance of products and flow of trade, including operations that constitute a considerable volume of customs services, therefore allowing the utilization of alternative guarantees on a distinctly larger scale.

B. Customs Bonds and Insurance Legislation

Insurance is specifically regulated by the Insurance Control Law No. 33 of 1999, and the regulations and instructions issued pursuant thereto. This Law and corresponding legal tools deal with insurance activities from a regulatory point of view. The Insurance Regulatory Law stipulates the following:

Article 3: (a) Notwithstanding what is stated in any other legislation, insurance business shall be divided into two main types, life insurance and general insurance, in either of which shall be included every activity which is considered within the insurance business by custom and practice; (b) The classes of both types of insurance shall be determined pursuant to instructions to be issued by the Board.

Pursuant to this Article, Instruction No. (1) 2000 for Classes and Licenses of Insurance Business was issued. This instruction provides an extensive list covering types and classes of insurance. The following highlights those classes that may be considered similar to or relevant to customs bonds:

Article 2: The general insurance business shall be divided into the following classes:

Accidents, including the loss of the Insured due to risks the Insured is exposed to:

13- General Liability: including losses due to all liabilities, other than those covered by the classes stipulated in paragraphs (10), (11) and (12) of this Article.

14- Credit: including the loss of the Insured due to bankruptcy, failure to pay due debts, export credit, installment credit, mortgage and agricultural credit.

15- Suretyship: including loss due to direct and indirect suretyships.

16- Miscellaneous Financial Losses: including the loss of the Insured due to any of the following risks:-

A- Interruption of business carried on by the Insured or reduction of the scope of that business.

B- Incurring unforeseen expenses.

C- Financial loss of the Insured, neither stated under paragraph (A) nor (B) of this Article.

The articles listed above indicate that in principle, customs bonds seem to be covered in the insurance classes subject to licensing by the Insurance Commission. This opinion is derived from the apparent reading of the subclass “General liability” covering any sort of liability incurred by any person. This subclass is indeed very wide in scope and presumably is sufficient to allow for the usage of customs bonds. In any case, this should be subject to a clear direction and recommendation from the Insurance Commission, which is most capable of ensuring whether or not bonds may be fitted within the subclass mentioned.

The role of the Insurance Commission in this process is very important, because if bonds are not allowed or not included in this subclass, then an amendment of the instructions cited above must be sought to clearly stipulate the customs bonds, their definition and scope of application. An amendment will also be required to set the regulatory and operational requirements and needs for the insurance companies to issue this type of insurance, as well as the liabilities of the insured person and the entitlements and damages of the beneficiary.

C. Customs Bonds and Civil Legislation and Applicable Jurisprudence

In contrast, it is imperative to decide whether the scope and subject matter that such insurance bonds cover are legal. Therefore, the legal areas related to the insurance contract must be reviewed against the corresponding legislation, which is Civil Code No. 43 of 1976.

In reviewing the customs bond legality under this legislation, we have taken into account that liabilities are covered arising from: (a) customs fines resulting from violations by the insured person and, (b) customs dues (taxes and duties) incurred by the insured.

(a) Fines imposed by the Customs Law are part of the criminal liability of a person, and there is no explicit stipulation in the law that allows for the insurance bond to cover such liabilities. Furthermore, a review of jurisprudence and court rulings indicate that the subject matter of an insurance contract can not be a coverage of criminal liability, hence a fine. This is construed as contradictory to the following established legal principles:

- Attachment of the penalty and criminal liability to the violator in person. Criminal liabilities are not subject to waiver or transfer to another party.
- The philosophy of deterrence that constitutes the basis for criminal liability. If we argued that insurance is allowed on fines and penalties, then we would obscure the application and jeopardize the rationale behind penalties.

It is established under jurisprudence and judicial understanding that criminal liability is within the scope of public order. This is important as the Civil Code provides that a matter “inconsistent with Public Order may not be subject of insurance contract” (Article 921). It may be argued plausibly that insuring upon a violation is inconsistent with public order.

(b) Liability of the insurance company for customs duties and taxes.

Whereas there are no clear and decisive provisions on this matter, it must be noted that there seems to be consensus in jurisprudence that accidents/ risks insured must be probable, and that their occurrence must not occur as a result of the insured deliberate action.

The risks subject matter of insurance contract are in the case of customs insurance the insured person's failure to pay the customs duties and taxes imposed thereon. This may arguably undermine the validity of the contract.

III. Recommendations

It may be argued that insurance bonds shall not include insuring against criminal liability and fines imposed on the insured (however debatable that is). This entails that we are still in need of another form of security to cover the liability of the insured to pay the fines.

Adopting customs bonds may be allowed as an accepted form of guarantee by the insured to cover his liabilities incurred under the Customs Law, other than fines. However, and in case this is granted, the following must take place:

- Seek to obtain the explicit and preferably in writing, the direction of the Insurance Commission on the availability of customs bonds under the current stipulation of the insurance legislative package, or in the case where this was not applicable, seek to amend the Instructions on Classes and Licenses of Insurance Business No. (1) of 2000 to provide for this type of insurance explicitly.
- Issue the necessary instructions/administrative decisions pursuant to the Customs Law No. 20 of 1998, which provide for using such type of guarantees, in addition to, or in replacement of, the guarantees securing customs operations mentioned in the Law.
- Amend the articles in the Customs Law that do not allow the application of alternative/additional forms of securities such as customs insurance.